Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF PAETEC HOLDING CORP.,
MPOWER COMMUNICATIONS CORP. AND U.S. TELEPACIFIC CORP.,
AND RCN TELECOM SERVICES, LLC

April 1, 2011

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Executive Summary

PAETEC, TelePacific, and RCN ("Facilities-based CLECs") commend the FCC for its comprehensive Notice and its commitment to completing action in this docket quickly. In addressing the so-called arbitrage issues included in Section XV, Facilities-based CLEC urge the FCC to stay focused on the ultimate goal of a unified rate that applies to all forms of traffic, regardless of jurisdiction or type of carrier/provider. Facilities-based CLECs agree that access rates should be transitioned to a cost-based rate, but there is no reason to single out so-called "arbitrage traffic" for a faster transition to that cost-based rate than the same price cap access rate charged by the ILEC.

Even with new rules to address phantom traffic, the information needed to rate calls may be lost during hand-offs between different technologies, thus reinforcing the need to reach the FCC's end goal of a uniform rate. In these initial comments, Facilities-based CLECs focus on the problem of 1+ TDM originated traffic that is unbillable and recommend that the FCC modify its proposed rules to (1) require that all service providers, where technically feasible, pass *all* signaling call detail necessary to bill intercarrier compensation, including the Carrier Identification Code ("CIC"), Jurisdiction Information Parameter ("JIP") which converts to Local Routing Number ("LRN"), Calling Party Number ("CPN"), Charge Number ("CN"), and Automatic Numbering Information ("ANI"); (2) make clear the FCC is not creating a presumption that the originating party is always responsible for paying terminating compensation; (3) recognize that exceptions exist to the general rule beyond "published" industry standards; and (4) impose an affirmative duty on all service providers to share information necessary for the terminating provider to rate and bill for terminating a call.

The CLECs also urge the FCC to recognize that so-called self-help, the practice of refusing to pay for billed originating and terminating charges, is a form of arbitrage. Ensuring that carriers are able to collect revenues for the origination and termination services they provide would reduce uncertainty and free up accounting reserves and capital for investment in broadband networks and the transition to IP interconnection. The FCC should therefore reiterate its prior findings that carriers must pay and dispute tariffed rates.

While better targeted than several earlier proposals on the record in WC Docket No. 07-135, the proposed access stimulation rule still goes beyond addressing the legitimate goal of reducing rates that were set high based on assumed low volumes of use, but are being imposed on high volume access services. Facilities-based CLECs explain what aspects of the proposed rule are overbroad and make recommendations to limit the burdens and competitive disadvantages imposed on CLECs.

Because there is no industry standard to identify VoIP-originated or terminated traffic, and the goal of the NPRM is to unify rates, the FCC should not adopt a VoIP-specific rate. As explained herein, the FCC has the authority to adopt new rules that bring VoIP traffic within the access and reciprocal compensation regimes. Adopting new rules that apply existing TDM intercarrier compensation charges to VoIP traffic during the transition period would be consistent with the FCC's goal of ending arbitrage, minimizing carrier disputes, and bringing the industry closer to a unified rate for termination of all traffic types.

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APRIL 1 COMMENTS

PAETEC Holding Corp. (on behalf of its operating subsidiaries PAETEC Communications, Inc., McLeodUSA Telecommunications Services, L.L.C., and the common carrier operating subsidiaries of US LEC L.L.C. and Cavalier Telephone) (jointly, "PAETEC"), Mpower Communications Corp. and U.S. TelePacific Corp., each d/b/a TelePacific Communications, and RCN Telecom Services, LLC, (together, "Facilities-Based CLECs" or "the CLECs") file these comments on the Federal Communication Commission's ("FCC's") Notice of Proposed Rulemaking ("NPRM"),[1] Section XV.

[1] *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation System, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Dockets No. 01-92, 96-45, FCC 11-13, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. Feb. 8, 2011) ("NPRM").

I. INTRODUCTION

Facilities-based CLECs commend the FCC for its comprehensive NPRM and its commitment to completing action in this docket quickly. The CLECs support rationalizing intercarrier compensation to remove arbitrage opportunities, promote competition, and move closer to the ultimate goal of having each carrier charge a unified rate regardless of the type of traffic it terminates. The CLECs are committed to working cooperatively with the Commission and industry to overhaul current intercarrier compensation policies. We look forward to participating in any consensus approach and providing the FCC the data and input it needs to evaluate the impact of reforms not only on incumbents, but also on facilities-based competitors and the small and medium enterprise customers that we serve. Adopting rules to transition from the current byzantine intercarrier compensation framework to a unified system based on cost will promote investments in advanced communications networks to the benefit of all Americans.

In addressing the so-called arbitrage issues included in Section XV of the NPRM, Facilities-based CLEC urge the FCC to stay focused on the ultimate goal of a unified rate that applies to all forms of traffic, regardless of jurisdiction or type of carrier/provider. Facilities-based CLECs agree that access rates should be transitioned to a cost-based rate, but there is no reason to single out co-called "arbitrage traffic" for a faster transition to that cost-based rate than the same price cap access rate charged by the ILEC. In these comments, the CLECs recommend changes to the rules proposed to reduce arbitrage without creating competitive disadvantages or moving the industry further away from a unified rate.

II. PHANTOM TRAFFIC

The phantom traffic challenges that exist today relate to the terminating end of a call. Adopting a unified termination rate would eliminate most, if not all, of the problems that plague billing for termination charges in today's byzantine system. In terminating a call, there are two possible methods of entry to the terminating carrier's network. The first is a direct trunk group to the terminating switch where the delivering party has agreed to pay the tariff or contract rate for termination. There are few, if any, billing issues related to this entry point because of the direct relationship between the delivering and terminating carrier. The second entry point to a terminating carrier's network is through one of the tandem companies that they have agreed to subtend. This is the interface that presents all the challenges to billing. If the rules treated all carriers and providers (no exemptions) alike and permitted the terminating carrier to bill a single rate to the party delivering the call to the tandem company, there would be no phantom traffic. The tandem companies have multiple means to identify the delivering carrier and the means of passing this information to the subtending carriers is most typically an option or already in place today.

Facilities-based CLECs understand that the FCC would like to adopt rules to reduce the instance of phantom traffic during the transition to a unified rate. While the CLECs support this effort, we caution that a typical call has the potential to bounce around the globe spanning multiple technologies and ultimately find an open back door to slip through and avoid higher terminating charges in favor of the lowest rate category. In short, unless and until the industry moves to a unified rate for all terminating minutes, regardless of jurisdiction or delivering provider, the FCC and terminating carriers will be playing a phantom traffic game akin to wack-a-mole. No matter how many call flows the FCC rules try to address, there will always be another call flow or new technology that may find that back door. That being said, the goal during this transition period should be to impose requirements that allow a terminating LEC the best opportunity to identify the responsible carrier along with the information necessary to bill the proper rate knowing that it may be impossible to eliminate the problem in its entirety.

In these initial comments, Facilities-based CLECs focus their recommendations on addressing the problem of 1+ TDM originated traffic that is unbillable. To enable terminating providers to bill for these calls, the FCC should modify its proposed rules to (1) require that all service providers, where technically feasible,[2] pass *all* signaling call detail necessary to bill intercarrier compensation, including the Carrier Identification Code ("CIC"), Jurisdiction Information Parameter ("JIP") which converts to Local Routing Number ("LRN"), Calling Party Number ("CPN"), Charge Number ("CN"), and Automatic Numbering Information ("ANI"); (2) make clear the FCC is not creating a presumption that the originating party is always responsible for paying terminating compensation; (3) recognize that exceptions exist to the general rule beyond "published" industry standards; and (4) impose an affirmative duty on all service providers to share information necessary for the terminating provider to rate and bill for terminating a call. The CLECs also raise questions about how SS7 and SIP signaling can co-exist to enable accurate terminating compensation under today's system. Even with rules to address phantom traffic, the information needed to rate calls may be lost during hand-offs between different technologies, thus reinforcing the need to reach the FCC's end goal of a uniform rate.

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[2] In this context technical feasibility should be limited to whether the carrier has existing technology capable of providing the required information. However, that does not mean that a service provider does not have an obligation to reprogram or otherwise modify its existing technology to pass along the required fields to pass along the signaling call detail. That other service providers are able to pass along the signaling call detail using comparable equipment should be presumptive proof that it is technically feasible.

A. Background on Call Signaling Data and Records Needed to Rate and Bill Terminating Compensation

In order to understand the real scope of phantom traffic, it is necessary to first review how carriers exchange traffic today, the call detail and records that are or are not sent with the traffic, and the various mechanisms carriers have available to bill for traffic terminating to their end user customers.

Because the proposed rules would apply to carriers and non-carriers, the CLECs will use "service provider" to refer to all providers in the call flow, "originating provider" to refer to the provider that originates the call, "intermediate provider" to refer to all providers that carry a call between the originating provider and terminating provider (including what is today referred to as the tandem or transit provider), and "terminating providers" to refer to the entity that delivers the call to the called party and bills terminating compensation, whether pursuant to tariff or contract.

To render accurate bills to other carriers, a terminating provider must rely upon the originating and intermediate providers to transmit accurate call detail via the signaling network and switch records. Today, terminating local exchange carriers ("LECs") typically rely on some combination of terminating switch recordings (which can capture available SS7 data) and records provided by the terminating tandem carrier (Exchange Message Interface ("EMI") or other) to bill terminating compensation.

Many carriers already exchange SS7 records with every call. For 251(g) traffic, the originating carrier sends an SS7 message with each call it routes, including the Carrier Identification Code ("CIC") of the interexchange carrier ("IXC"), and the shared/interconnected SS7 network of all interconnected carriers should pass the information on to all carriers involved in the call. The same is true for section 251(b)(5) traffic exchanged between two carriers that are directly interconnected using SS7 signaling.

B. Proposed Rule Does Not Achieve Goal of Identifying Which Provider Is Responsible to Pay Terminating Charges

In many places, the NPRM erroneously presume that using the CPN/CN to identify "the originating provider" in the call stream will facilitate billing and collection of the proper terminating charges. But for standard long distance traffic it is not necessarily (and in fact generally not) the originating provider (*e.g.*, the LEC serving the originating end user) who is responsible for paying any terminating switched access charges that are due on a long distance call. Rather, it is the last service provider delivering traffic to the terminating tandem provider who is typically responsible for the terminating charges.

As Ms. Spocogee explains in her declaration,[3] ensuring the passing of the CPN or the CN will not enable the terminating LEC to identify the service provider responsible for payment of the terminating access charges, nor will it necessarily properly identify the call as a toll call.[4] The missing element that must be retained in the call record throughout all handoff of the toll call is the Carrier Identification Code ("CIC").[5] The critical field that is required on an InterLATA call is the CIC code associated with the IXC delivering the call to the terminating provider.[6] In addition, with few exceptions not relevant here, industry standards provide that each IXC handling an interLATA call should populate the CIC field with its CIC. Thus, unlike CPN, the CIC field may change during a single call depending on the number of intermediate carriers, if any.

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[3] *See* Declaration of Tami J. Spocogee (attached hereto as Attachment A) ("Spocogee Declaration").

[4] *See* Spocogee Declaration, at 3-4.

[5] *See* Spocogee Declaration, at 4.

[6] *See* Spocogee Declaration, at 4.

Absent a requirement to maintain the CIC in the call record, the call type of a TDM-originated call handed off to an IXC may be changed from a TDM interstate/InterLATA toll call to a local call, and the terminating provider will have no means by which it can easily detect the change (whether fraudulent or inadvertent) in the call type or identify the offending intermediate provider responsible for the change. As Ms. Spocogee explains, there is no place to populate a CIC in the record for a local and/or intraLATA call.[7] Moreover, most carriers do not receive summary format EMI records for calls delivered over local interconnection trunks. Thus where an intermediate provider drops the CIC and changes the type of call, even with CPN that indicates the call started as toll, it is very difficult for the terminating provider to identify the appropriate party to bill. And even where the terminating provider identifies the service provider that delivered the call to the tandem, that party often claims an exemption from liability under various rate category arguments (*e.g.*, access stimulation, VoIP, etc.).

Where calls are IP-originated, there is no CIC associated with the call record. In fact, not all VoIP providers have LRNs or OCNs, so it is not clear how the terminating provider can identify the VoIP provider if the FCC amends its rules to apply access charges to interconnected VoIP calls.[8]

In sum, carriers use the following SS7 signaling parameters to jurisdictionalize traffic: CPN, CN, ANI, and LRN. They also use the following SS7 signaling parameters to identify the

[7] *See* Spocogee Declaration, at 7.

[8] According to NECA's North American Company Code Glossary, there is an OCN Category associated with Internet Protocol Enabled Services – IPES. According to the definition, Company Codes in this Category should be used to identify IP-enabled Service Providers interconnecting to the PSTN and can be used to enable the deployment of any new IP-enabled service, technology or advanced service. Thus, if all providers of IP services were required to have either an OCN or IPES company code, then the solution proposed for TDM calls of mandating the passage of the CIC would be a viable option to ensure that a terminating carrier can identify any intermediate provider responsible for payment of terminating access.

party responsible for paying terminating compensation: CIC and OCN. To achieve the goal of identifying the appropriate provider to bill terminating compensation, the rules should make clear that all call signaling data must be passed, including the CIC or OCN, and that intermediate carriers may not change call type from interLATA to local and/or intraLATA. Some of these parameters are not available in SIP signaling, however. As a consequence, a call originating on or transiting through an IP network will not maintain the CIC, for instance, unless the FCC mandates a change to current signaling practices. Moreover, the last intermediate provider, typically referred to as the tandem or transiting carrier, may not provide information necessary to identify the upstream carrier, unless the FCC requires them to provide such information.

C. The Requirements to "Populate" CPN and not Alter CN Should Recognize Key Exceptions that May not be Included in "Published" Industry Standards

The proposal to require originating providers using SS7 signaling to "populate" CPN[9] suffers from numerous deficiencies. First, it does not impose similar obligations on originating providers using other signaling methods. Second, because not all calls contain originating CPN (*e.g.* Skype, international), LECs often populate CN with a trunk or switch number to identify their customer who is responsible for payment and/or the point at which the call entered their network. In fact, some switches are "closed" so that they will only accept numbers associated with the provider's network and assigned to their customers.

Third, the provider may need to populate the CN with a number associated with its network and customer even when the customer sends originating CPN with the call (especially where the provider originating the call on the PSTN did not assign the CPN to the ultimate end user). It is not clear if populating the CN in this manner complies with the proposed rule that

[9] *See* NPRM, at ¶ 628.

"populating the SS7 CN field with information other than the charge number to be billed for a call is prohibited."[10] From the originating PSTN provider's perspective, it is populating the CN with the number of the customer it bills. But where the provider's customer is a VoIP provider, for example, the CN does not represent the "true originating" CPN because the proposed rules consider the VoIP provider as the originating provider.

As Ms. Spocogee explains, populating the CN in this manner assists the service provider in identifying their customer usage for billing purposes, troubleshooting, network identification, etc. and also means that the service provider does not have to load every single end user ANI into company databases, etc.[11] Restricting that practice would impact the network and require multiple changes to be made on existing customers and new processes developed for existing customers. Possible changes in billing systems may be required in addition to the network process changes. In short, the proposed rules regarding population of CPN and CN could disrupt existing industry practice, whether or not that practice is included in a "published" industry standard.

The FCC has already addressed the problem of missing originating information by developing the Entry/Exit Surrogate ("EES"). Specifically, the FCC adopted the EES to measure interstate and intrastate usage over access lines where Automatic Number Identification ("ANI") is not available. Since ANI is unavailable, the carrier is unable to determine the origination point of a call. Under the EES method, the carrier may substitute the point where a call first enters its network (*e.g.*, its Point of Presence) for the call origination point in the context of determining

[10] NPRM, at ¶ 631.

[11] *See* Spocogee Declaration, at 9.

the jurisdiction of a call. For example, a call without ANI that enters the carrier's network in Maryland would be jurisdictionally intrastate when the call terminates in Maryland.

The FCC initially adopted the EES method as a procedure for addressing the difficulty in identifying the jurisdiction of services provided by IXCs over Feature Group A ("FGA") and Feature Group B ("FGB") for the determination of jurisdictional cost separation and for access charge billing purposes.[12] The FCC went on to recognize that implementation of "adjustment factors" or alternative measurement techniques may be necessary where anomalies occur due to metropolitan areas that straddle state boundaries, but declined to adopt a nationwide adjustment system, preferring instead to allow carriers to seek variances where necessary.

Since adopting the EES for FGA and FGB, the FCC has also allowed the use of the EES to determine the jurisdiction of a call in other limited circumstances where the carrier cannot identify the origination point of the call. The FCC determined that carriers may use the EES method for switched "basic serving arrangements" where no ANI is available (for example trunkside switched access).[13] The FCC reemphasized that EES can be used in circumstances other than FGA/FGB by stating that:

> The EES has worked as a surrogate and no party has demonstrated why it cannot work equally well for ONA (Open Network Architecture) services. In addition, given that no party has offered an alternative mechanism that would work better or any new arguments that would convince us to reverse our original decision, we decline to

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[12] *See Determination of Interstate of Intrastate Usage of Feature Group A and Feature Group B Access Service*, Memorandum Opinion and Order, CC Docket No. 85-124, 4 FCC Rcd 8448 (1989).

[13] *See Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 & 87-313, 6 FCC Rcd 4524 (1991). The FCC determined that switched basic serving arrangements are technically similar to feature groups so that no changes were needed in the EES method. *See also Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1 (1988).

> modify this portion of our decision….[W]e are essentially retaining the EES treatment applicable to the feature groups where there are similar measurement problems for unbundled ONA access components.[14]

Today, many ILECs still include the EES method in their access tariffs.[15]

The FCC should consider a rule similar to EES for originating providers that do not receive CPN from their customers, namely that the originating provider may assign CN to associate the call with its network and customer. Facilities-based CLECs believe this would be consistent with current industry practice and the proposed call signaling rules. The solution for CPN and CN that differs due to switch limitations is more difficult to solve, but Facilities-based CLECs will continue to explore potential solutions to propose for the FCC's consideration.

D. All Service Providers Should Provide, where Available and Technically Feasible, Information Needed to Rate a Call and Determine the Appropriate Party to Bill Terminating Compensation

The FCC should adopt a rule that obligates the service provider to share information necessary to identify the service provider responsible for terminating charges. Only the intermediate provider knows if the call going out of its switch has the same call detail that it had when it entered that provider's switch. Making the intermediate provider responsible for providing upstream carrier information where call detail is missing and/or switch records have been altered is imperative given the intermediate provider's gatekeeper function.

To ensure cooperation between terminating carriers, intermediate providers, and originating providers, the FCC should adopt a rule under section 222(b) that requires every

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[14] *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Memorandum Opinion and Order on Reconsideration, CC Docket No. 89-79; 8 FCC Rcd 3114, ¶ 22 (1993).

[15] *See*, *e.g.*, Qwest Corporation, Tariff F.C.C. #1, § 2.3.10.A.

service provider to share information necessary to identify from which service provider the intermediate provider received the traffic. The FCC should also require the originating provider to identify the intermediate provider to whom the originating provider delivered the call. Under section 222(b), "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." Under 222(b), a terminating carrier may use carrier proprietary information "for the purposes of providing any telecommunications service," namely to bill the entity responsible for terminating compensation. Adopting an affirmative obligation to provide such information would be consistent with section 222(b)'s recognition that a telecommunications carrier may "obtain" such information. It would also resolve the issue of service providers denying liability for terminating compensation when they deliver calls to a tandem, yet refusing to cooperate in an investigation to determine the information necessary to verify the rate that should apply to the call.

E. The FCC Should Prohibit Charges for the Call Detail, Record, and Other Information Necessary to Comply with Its Rules

When the FCC adopted rules requiring SS7 carriers to pass CPN on interstate calls, it determined that the carriers should not be permitted to charge for delivering or blocking CPN.[16] The Commission noted that "industry standards already include the calling party number as an optional parameter of an SS7 network," and therefore "the costs of transmitting CPN are de

[16] *See* 47 C.F.R. § 64.1601(c).

minimis."[17] Likewise, the call signaling, records and other information necessary to jurisdictionalize calls and determine who to bill is in most situations (except for some forms of VoIP) already are being generated. Accordingly, the costs of passing such information are likely de minimis.

Moreover, just as passage of CPN benefits all subscribers on the PSTN, passage of call signaling, records, and other information necessary to jurisdictionalize calls and determine who to bill benefits all service providers connected to the PSTN. Without such information, carriers cannot recover their terminating costs and sustain the universal connectivity of the PSTN. The Commission should therefore amend Rule 64.1601(c) to prohibit charges for passage of all call signaling, records, and other data required to be passed or provided under its new rules.

F. Recommended Changes to Proposed Rule

Consistent with the discussion above, Facilities-based CLECs recommend the following changes to the FCC's proposed call signaling rules:

- Although the text of the NPRM recognizes in a number of places that *all* call signaling data should be passed,[18] the text of the proposed rule appears to be limited to CPN, CN, and ANI.[19] Other call signaling fields, such as CIC, OCN and LRN, would be useful to determine the appropriate rate and party to bill for the call. The rule should require passage of all such signaling fields, where technically feasible.

- Proposed rule 64.1601(a)(2) should be amended to delete "published." Some carrier practices may deviate from the rules by following "widely-used industry standards" that have not yet been formalized in published standards.

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[17] *Rules and Policies Regarding Calling Number Identification Service - Caller ID*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-281, FCC 94-59, ¶ 23 (rel. Mar. 29, 1994).

[18] *See* NPRM, at ¶¶ 626, 632.

[19] Proposed rule 64.1601(a)(2) requires passage of "all signaling information identifying the *telephone number of the calling party*" (emphasis added).

- To ensure cooperation between terminating carriers, intermediate providers, and originating providers, the Commission should adopt a rule under section 222(b) that requires every intermediate provider to share information necessary to identify from which service provider the intermediate provider received the traffic. The Commission should also require the originating provider to identify the intermediate provider to whom the originating provider delivered the call. All providers should be required to share information necessary to rate traffic.

- The FCC should amend rules 64.1601(c) to prohibit changes for providing and/or passing not only CPN, but also all call signaling, switch records, and information about intermediate carriers.

The FCC should also clarify that nothing in its rules or orders impose an obligation on the originating provider to pay terminating compensation in every instance. Rather, the FCC should acknowledge that most tariffs require the service provider delivering the traffic to the tandem to pay terminating compensation.

III. SELF HELP IS A FORM OF ARBITRAGE

In response to the NPRM request that carriers identify other forms of arbitrage,[20] Facilities-based CLECs identify so-called self help as arbitrage. Self help occurs when a carrier that has sent or received traffic over another carrier's traffic exchange facilities unilaterally declares that this traffic, or some of it, is not subject to intercarrier compensation charges (either access charges or reciprocal compensation, as applicable) and refuses to pay some or all of the bill for the services it has already used and benefitted from in providing service to its end user customers.[21] This is arbitrage because it allows the carrier serving the end user to collect revenues from that end user that cover the entire cost of service, including the cost of the other

[20] *See* NPRM, at ¶ 607.

[21] The refusal to pay is usually based on a claim that traffic originated or terminated over the traffic exchange facilities is "VoIP," although other excuses for disputing access and reciprocal compensation charges also exist.

carrier's termination service, without actually paying those costs. Getting rid of this form of arbitrage would ensure that carriers are able to collect revenues for the termination services they provide, thus reducing uncertainty and freeing up accounting reserves and capital for investment in broadband networks and the transition to IP interconnection.

Self help shares the characteristics of the three forms of arbitrage the Notice targets for elimination.[22] Like the uncertainty surrounding what rules and rates apply for the compensation of VoIP traffic, the uncertainty about whether the courts and FCC will enforce a tariff or interconnection agreement has led to numerous billing disputes and litigation. Just as different rates for terminating traffic have created incentives for carriers to disguise traffic to avoid or reduce payment, the FCC's and courts' refusal to enforce the filed rate doctrine has created incentives for new excuses to avoid or reduce payment of tariffed rates.[23] Finally, just as above-cost rates incent carriers to stimulate traffic to rural areas, the lack of certainty regarding how certain traffic should be treated has provided an opportunity for service providers to refuse to pay for services they receive at anything other than the lowest possible rate. Notwithstanding numerous requests by carriers that the FCC address self help in the NPRM, the only statement about self help did not reiterate the filed rate doctrine's pay first and dispute later policy. Rather than affirm that tariffs and interconnection agreements carry the force of law, the NPRM merely states "nothing in the instant Notice should be read to encourage, during the pendency of this proceeding, unilateral action to disrupt existing *commercial arrangements* regarding

[22] *See* NPRM, at ¶¶ 604-606.

[23] Section 252 interconnection agreements are the functional equivalent of tariffs and are within the scope of the filed rate doctrine. *See, e.g., Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 679-81 (8th Cir. 2009).

compensation for interconnected VoIP traffic."[24] Commissioner Copps came the closest to reiterating the doctrine in his statement accompanying the NPRM, where he observed that: [w]e all see the symptoms of decision-making deferred: *too much litigation, self-help, and market power* as a substitute for the honest rules needed to minimize arbitrage, promote investment and deployment, and maximize the opportunity for new technology to flourish."[25]

Facilities-based CLECs agree with Commissioner Copps that the "Commission must address these issues *head-on*."[26] PAETEC repeatedly has urged the Commission to address the burgeoning use of self-help by affirming the requirement that carrier-customers must pay lawfully tariffed switched access rates while disputing the application of such charges.[27]

In Facilities-based CLECs' experience, carrier-customers, who are often competitors, are refusing to pay intercarrier compensation where they dispute either the rate for one category of service and/or the application of charges to one category of traffic. For example, an IXC claims that a portion of the traffic is VoIP, but refuses to pay 100% of the charges, *or* the IXC identifies and re-rates the current VoIP traffic at a lower rate but still refuses to pay all other charges in order to "claw back" and recoup prior payments made for alleged VoIP traffic. Many others report similar abuses of market power by carriers that engage in self-help and refuse to pay

24 NPRM, at ¶ 614.

25 NPRM, at ¶ 280 (emphasis added).

26 *Id.* (emphasis added).

27 *See, e.g., PAETEC Notice of Ex Parte Communications*, WC Dockets Nos. 07-135, 01-92, at 1-2 (March 26, 2010); *PAETEC Notice of Ex Parte Communications*, WC Dockets Nos. 07-135, 01-92, at 1-2 (September 24, 2010); *Joint Reply Comments of PAETEC Communications, Inc., Citynet, LLC, Granite Telecommunications, Inc. and U.S. TelePacific, Corp., High-Cost Universal Service Support, Federal State Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services,* WC Dockets Nos. 05-337, 04-36, 03-109, 06-122, 04-36, 07-135, CC Dockets Nos.96-45, 99-200, 96-98, 01-92, 99-68, at 26-30 (Dec. 22, 2008).

lawfully tariffed switched access charges. On February 1, 2011, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, and the Western Telecommunications Alliance filed joint *ex parte* comments with PAETEC and U.S. TelePacific Corp. addressing their shared concerns regarding the unilateral self-help measures they have experienced with some carriers.[28] On January 18, 2011, the CEOs of Qwest, CenturyLink, Frontier, and Windstream requested that the Commission enforce existing switched access rules.[29] Four other companies report that Verizon has determined "to stop paying access charges due for long distance traffic that Verizon sends to or receives from local exchange carriers in TDM if that traffic is, in Verizon's words, 'IP-originated or IP-terminated.'" According to these companies, Verizon took this "unilateral and abrupt action" "solely because a portion of the traffic is destined to or received from retail VoIP providers affiliated with the affected companies." In fact, these companies maintain that Verizon "in most cases, *indiscriminately stopped paying access charges on all traffic exchanged with them*, even where the traffic is not carried in IP at any point."[30] This diverse group of carriers objecting and expressing "grave"[31] concerns about self-help confirms that non-payment of access charges has become a widespread, urgent problem in the industry that the FCC needs to address.

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[28] *Ex Parte of PAETEC Holding, Corp. et al*, CC Docket No. 01-92 (Feb. 1, 2010).

[29] *Ex Parte Communication of Qwest Communications, CenturyLink, Inc., Frontier Communications, and Windstream*, GN Docket No. 09-51, WC Docket Nos. 07-135, 05-337, 04-36, CC Docket Nos. 01-92; 99-68, at 1 (Jan. 18, 2011) ("*Qwest Ex Parte*").

[30] *Ex Parte* of Cox Enterprises, Inc., Brighthouse Networks, Cablevision Systems Corporation, and Charter Communications, CC Docket No. 01-92 (filed Feb. 1, 2011) ("*Cox Ex Parte*") (emphasis added).

[31] *Qwest Ex Parte*, at 1.

The FCC has long prohibited carriers from engaging in "self-help," finding that "a customer, a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations."[32] The pay first and dispute later policy is based on the filed rate doctrine, also known as the filed tariff doctrine. This doctrine is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act, was later applied to telecommunications common carriers and eventually was codified in Section 203 of the Act. Once filed, tariffs establish the rates IXCs must pay for tariffed services, and "have the force of law."[33]

The FCC came close to reiterating its policy to prohibit "self-help" in the summer of 2007, but clearly did not go far enough. It said that IXCs cannot block traffic unilaterally, either to put pressure on other carriers to lower their charges, or to avoid incurring greater liabilities to those carriers, and noted that it has required common carriers to complete traffic while pursuing their complaints against the interconnecting carriers in appropriate forum.[34] Nonetheless, it did

[32] *Brooten v. AT&T Corp.*, 12 FCC Rcd 13343 at n.53 (Common Car. Bur. 1997) (citing *MCI Telecommunications Corp.*, 62 F.C.C.2d 703, 705-706 (1976)); *see also Tel-Central of Jefferson City Missouri, Inc. v. United Telephone Co.*, Memorandum Opinion and Order, 4 FCC Rcd 8338, 8339, ¶ 9 (1989); *National Communications Association, Inc. v. AT&T Co*., 2001 WL 99856, *6 (S.D.N.Y. Feb. 5, 2001) ("The clear line of authority regarding rate disputes is that *the customer may not resort to self-help*; that is, the customer may not merely refuse payment of the disputed rate but must pay the rate and then bring an action to determine the validity of the carrier's actions.") (emphasis added); *James M. Carpenter et al. d/b/a Carpenter Radio Company*, Memorandum Opinion and Order, 70 FCC 2d 1756, at ¶ 6 (1979) ("[A] customer has a legal obligation to pay all tariffed rates for telecommunications services . . . until such time as these rates are found unlawful by the Commission or a court of competent jurisdiction.").

[33] *Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363 (D.C. Cir. 1980).

[34] *Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11629, ¶ 1 (Wireline Comp. Bur. 2007) ("*FCC Call Blocking Order*") (citing sections 151 and 254 of the Communications Act).

not address the other side of the coin, where the interconnecting carrier allows the traffic to be completed but fails to pay for that service. As a result, the record shows that IXCs repeatedly fail to heed the pay first and dispute requirement.

With respect to IP-originated traffic, it is clear that the Enhanced Service Provider ("ESP") exemption applies to "providers" that purchase local service and *not to* traffic.[35] The ESP exemption may permit certain entities to obtain local business connections to the PSTN *in lieu of* using interstate access services,[36] but it was never intended to permit an entity to route and deliver calls without *any* payment of access charges where that entity specifically used Switched Access Services. Indeed, the Commission has held that interexchange carriers ("IXCs") cannot avoid paying interstate switched access charges for their use of Switched Access Services based upon the fact that the IXC is sending traffic either to or from an ESP.[37] Significantly, these principles apply *regardless* of how the Commission decides to classify providers of VoIP services prospectively (which is discussed further in Section V below): if those entities are carriers, then of course they must pay intercarrier compensation charges; but even if they are

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[35] *See ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409 (D.C. Cir. 2002) (FCC did not "directly exempt[] ESPs from interstate access charges" but "defined them as 'end users.'"). *Access Charge Reform*, CC Docket Nos. 96-262, 94-1 *et al.*, 12 FCC Rcd. 15982, 16133 ¶¶ 343-345 (1997) (ESPs should remain classified as end users); *see also* 47 C.F.R. § 69.2(m).

[36] *MTS and WATS Market Structure*, CC Docket No. 78-72, 97 FCC 2d 682, Memorandum Opinion and Order, 1983 WL 183026, ¶ 83 (rel. Aug. 22, 1983); *Intercarrier Compensation for ISP-Bound Traffic*, CC 99-68, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶ 27 (rel. April 27, 2001) ("the ESP exemption . . . affords one class of entities using interstate access -- information service providers -- the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by IXCs").

[37] *See Northwestern Bell Telephone Co. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd. 5986, 5988, ¶ 21 ("End users that purchase interstate services from interexchange carriers [, such as 800 or 976 services,] do not thereby create an access charge exemption for those carriers."), *vacated as moot*, 7 FCC Rcd. 5644, ¶ 1 (1992); 47 C.F.R. § 69.5(b).

information service providers, that status would only entitle them to be treated as end users when they purchase end user services.

Unless and until the Commission changes its rules, customers who are using Switched Access Services, or responsible for sending or receiving traffic over Switched Access Services (including 1+ or "8YY" traffic), must pay and dispute charges pursuant to the applicable tariffs. By the same token, carriers that entered into section 252 interconnection agreements binding them to pay reciprocal compensation for termination of local traffic must pay those charges regardless of whether their underlying end user is an enhanced service provider or some other class of customer.

The FCC should make clear that carriers may not refuse to pay competitors for lawful tariffed charges, engage in traffic discrimination, or undertake any other practices designed to force LECs to transition to lower rates sooner than required by the FCC.[38] During the transition to a unified rate, because rates will continue to vary based on jurisdiction (interstate versus intrastate versus local), if there is any uncertainty concerning whether a tariff applies, carriers will continue to have an incentive to refuse payment of *any* compensation during the transition to a uniform rate. Accordingly, Facilities-based CLECs urge the FCC to (1) reiterate that carriers must pay and dispute a tariffed rate, (2) establish an expedited mediation process to resolve disputes about application of intercarrier compensation rates, and (3) adopt enforcement mechanisms that punish self help where the billing carrier is found to have applied the correct rate and the paying carrier refused to pay during the dispute.

[38] Although carriers may have legitimate disputes concerning jurisdictional classification of traffic, those disputes should not give a customer a free pass to refuse to pay all intercarrier compensation charges, or pay less than the billed amount until the dispute process is resolved.

IV. ACCESS STIMULATION

The goal of the proposed rule should be to thwart schemes that drastically increase terminating access traffic to take advantage of high access rates. The rules should be narrowly tailored to address those wrongs, and those wrongs alone. While better targeted than several earlier proposals on the record in WC Docket No. 07-135, the proposed rule still goes beyond addressing that legitimate goal. In this section, Facilities-based CLECs explain what aspects of the proposed rule are overbroad and make recommendations to limit the burdens and competitive disadvantages imposed on CLECs.

A. The "Net Payor Test" Is Not A Reliable Indicator of "Access Stimulation" and Would Be Difficult to Administer and Enforce

The net payor test is not a reliable indicator of unreasonable traffic stimulation. For example, the willingness of a LEC to share revenues with a hotel, university, or other aggregator, does not provide any incentive to the end user customer to place additional calls since those end users are not actually placing all the calls in that type of environment.[39] Whether or not a particular revenue sharing arrangement is likely to cause unreasonable traffic-volume spikes in high-access-rate areas is primarily a function of the portability of the traffic, not of the amount and direction of net payments between a "party" to the agreement with the LEC. Because it targets the wrong factor, the "net payor" trigger is both under- and over-inclusive. It is therefore unreasonable and ineffective.

Companies operating in good faith that seek to comply with the trigger will be required to review existing customer contracts and try to fit round pegs into square holes. CLECs would

[39] *Access Charge Reform*, CC Docket No. 96-262, Eighth Report and Order, FCC 04-110, ¶ 70 (May 18, 2004) ("*Eighth Report and Order*") ("The IXCs have failed to demonstrate that commission payments to 8YY generators such as universities or hotels translate effectively into incentives for individuals who actually use those facilities to place excessive or fraudulent 8YY calls.").

also have to create elaborate tracking tools that may have to cross multiple billing or invoice systems for products and services, many of which extend well beyond telecommunications services (*e.g.*, software, resold electricity, CPE), none of which exists today, to monitor arrangements the LEC and potentially various affiliates might have with each of their customers (and potentially various affiliates of each customer), so that each time that a particular customer wanted to order a new service from the LEC, the LEC could then reasonably ascertain whether the new incremental business opportunity with that customer would cross the "net payor" threshold.

As a practical matter, enforcement will rely on the same processes used today. An IXC would likely complain when it sees increased traffic volumes to a particular LEC or, perhaps engage in self help by withholding payments, either of which will trigger a request for FCC enforcement action or a section 208 complaint, or a collection action. In short, the net payor trigger will lead the FCC right back to where it started, investigating and adjudicating individual complaints.

B. The NECA Cap Together with Streamlined Waiver Process Will Limit False Positives

Although the FCC has expressed concern about how and at what level to set a minute of use trigger, Facilities-based CLECs believe these concerns can be addressed by setting the trigger based on the characteristics of the rate the CLEC is mirroring/charging. In the case of the rural benchmark rate, use of the NECA cap would address the Commission's concern about a trigger that results in a false positive, thus requiring a LEC not engaged in "access stimulation" to reduce its rates.[40] NECA rates are based on the cost characteristics of a LEC with no more

[40] NPRM, at ¶ 668.

than 3000 access lines and 2000 minutes of use per access line.[41] As NECA explained:

> Most average schedule pool members and sample companies consistently report monthly interstate access minutes per line in the range between 100 and 300. A small percentage of companies reports higher volumes, but usually less than 2000 minutes per line. While companies may incur some incremental costs for switching higher volumes minutes per line, NECA does not have data to determine what this cost might be. Accordingly, NECA continues to propose that its central office formula apply only to volumes up to 2000 monthly access minutes per line.[42]

A LEC that exceeds the NECA caps should not be entitled to charge the rates that are calculated based on those caps. The trigger could require any CLEC mirroring a rural ILEC rate or electing the rural benchmark to measure its terminating access minutes of use charged at that rate on a quarterly basis. If the total MOU exceeded 18 million in a quarter (2000 MOU times 3000 access lines times three months),[43] the CLEC would be required to refile within 45 days. Any CLEC mirroring the BOC rate would not be subject to this trigger and would not be required to refile.

Using the NECA cap as the trigger would also meet the Commission's goal of ensuring that its trigger adapts to future traffic volumes.[44] NECA appears to evaluate and update the caps in each annual filing.[45] Just as the Office of Managing Director uses information submitted by

[41] Comments of the National Exchange Carrier Association, Inc., WC Docket No. 07-135, at 8 (filed Dec. 17, 2007).

[42] National Exchange Carrier Association, Inc., 2011 Modification of Average Schedules, WC Docket No. 10-251, at VII-32 (filed Dec. 23, 2010).

[43] Comments of National Exchange Carrier Association, Inc., WC Docket No. 07-135, at 8 (filed Dec. 17, 2000).

[44] NPRM, at ¶ 668.

[45] *See* National Exchange Carrier Association, Inc., 2011 Modification of Average Schedules, WC Docket No. 10-251, at VII-31 (filed Dec. 23, 2010); National Exchange Carrier Association, Inc., 2010 Modification of Average Schedules, WC Docket No. 09-221, at VII-32 (filed Dec. 23, 2009); National

(Footnote continued on next page.)

the Universal Service Administrative Company to calculate and publish the quarterly Universal Service contribution factor, the Wireline Competition Bureau could review and publish the annual NECA caps.

To the extent a LEC believed its customer and/or cost characteristics nevertheless justify charging a higher rural rate, it could petition the Commission for waiver. The Commission could establish a streamlined waiver process similar to its discontinuance requirements. The LEC would file the request with supporting access line and traffic volume information, a copy of the notice of requested waiver sent to all IXCs billed access in the six months preceding the waiver request, and an affidavit confirming that the LEC is not a net payor to any customer in the service territory where it seeks to maintain the higher rural access rate. After a comment period, the waiver would automatically be approved unless the Commission removed the request from streamlined treatment.

C. A LEC that Fails to Lower Its Rates Upon Meeting the Trigger Should Lose Deemed Lawful Protection; LECs that Comply with the Rule Should Maintain It

The FCC should revise its deemed lawful proposal so that refunds can be required when the LEC meets the trigger but fails to comply with the rules requiring lower rates. Prohibiting a LEC that complies with the rule from filing under section 204(a)(3)[46] is punitive and contradicts the FCC's finding that price cap rates are generally much lower and not subject to access

(Footnote continued from previous page.)

Exchange Carrier Association, Inc., 2011 Modification of Average Schedules, WC Docket No. 08-248, at VII-34 (filed Dec. 23, 2008).

[46] Section 204(a)(3) provides that LEC tariffs filed on seven days notice (when rates are reduced) or 15 days notice (for any other change) are "deemed lawful" following the notice period unless rejected or suspended and investigated by the Commission. This effectively means that tariffs filed on 7 or 15 days notice are conclusively presumed to be reasonable under section 201 of the Act and are thus protected from retrospective refund liability in a formal complaint proceeding.

stimulation complaints.[47]

The Commission's elimination of "deemed lawful" filings is especially unfair for Facilities-based CLECs, who have been required to tariff their access rates at those of the competing price cap ILEC and have not elected the rural exemption. Indeed, since July 2004, all CLECs that file their interstate access tariffs pursuant to 47 C.F.R. § 61.26 have been required to mirror the access rates of the competing ILEC. Under the Commission's proposal, if any of these CLECs were engaged in a revenue sharing arrangement at the time the new rules were implemented, they would be considered "access stimulators" and it appears they would be required to re-file their access tariffs but such tariffs would not have deemed lawful status.

This makes no sense. The access stimulation problem is no more created by CLECs who mirror competing price cap ILEC access rates than it is by price cap ILECs who charge the same exact access rates. Even the Commission acknowledges that the "absence of access stimulation complaints against price cap incumbent LECs is not surprising given the low level of price cap LEC interstate access rates relative to other carriers."[48] Yet, the Commission's proposed rules would eliminate the ability of CLECs who share revenue to file deemed lawful tariffs, while price cap ILECs who share revenue would continue to be able to file deemed lawful tariffs. Such a result is patently discriminatory against CLECs and is contrary to the pro-competitive goals of the Act. There is simply no public policy benefit that justifies discriminatory treatment by the Commission's regulations.

CLECs rely upon deemed lawful tariffs to assist in calculating revenue, implementing business plans and eliminating disputes. The latter is particularly important for CLECs who have

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[47] *See* NPRM, at ¶ 666 and proposed rule § 61.26(d)(2)(iv).

[48] NPRM, at ¶ 642.

encountered countless disputes and litigation with IXCs who engage in self-help and refuse to pay CLEC access charges, as discussed further in section III. These disputes only will proliferate if the Commission prohibits CLECs who share revenue from filing tariffs with deemed lawful status, and would further incent IXCs to target self-help against CLECs since IXCs would know that only CLECs could not rely on the filed rate doctrine to justify collection of unpaid access charges.

The proper "deemed lawful" solution is to have a LEC lose deemed lawful status only if it is charging higher access rates than the BOC/largest ILEC *at the time that the LEC is required to refile its tariff*. This would apply even if the LEC with the higher rate failed to comply with the rule and did not refile its tariff. This solution ensures that the elimination of deemed lawful filings only applies to those LECs with higher access rates who are responsible for "access stimulation."

D. Revenue Sharing Is Lawful and The FCC Should Not Prohibit It

"Revenue sharing" is a common business practice in telecommunications that has been upheld by the Commission numerous times against challenge. Although IXCs and wireless carriers have complained often and loudly about revenue sharing in this proceeding, IXCs have been known to share end user revenue with marketing agents, sometimes only retaining a token fee as the service provider and wireless carriers have been known to share revenues with phone manufacturers. Indeed, revenue sharing has always permeated the industry with international carriers sharing settlement revenue to increase traffic on their networks; payphone providers sharing revenue with premises owners; and operator service providers paying commissions to traffic aggregators. In fact, every discount off of standard pricing offered by a communications provider to an end user is, in effect, a form of "revenue sharing" to that end user for stimulating traffic growth.

Not only is revenue sharing a common practice, but the FCC explicitly approved it in the *CLEC Access Charge Reconsideration Order* when it found that commission payments from CLECs to generators of toll-free traffic, such as hotels and universities, did not create any incentives for the individuals who use those facilities to place excessive or fraudulent calls.[49] Significantly, the FCC found that because the payments are being made to the hotel or university itself, and not to the students or hotel guests who place the bulk of the toll-free calls, the "primary effect of commission payments appears to be to create a financial incentive for the institutions to switch from the incumbent to a competitive service provider" and not to create any incentives for to stimulate excessive or fraudulent calls.[50] Indeed, revenue sharing represents a critical tool that competitive carriers use to increase volume on their networks and compete with incumbents. The FCC's conclusions in the *CLEC Access Charge Reconsideration* Order are directly at odds with the FCC's proposal to use the existence of revenue sharing as evidence of access stimulation. And, since the FCC's goal is to eliminate arbitrage that is based upon the generation of elevated traffic volumes,[51] and the FCC already has found that the mere existence of a revenue sharing agreement does not in itself creative incentives for the calling parties to generate elevated traffic volumes, the FCC's revenue sharing trigger proposal should not be used.

The FCC also has approved revenue sharing arrangements involving payphones and chat lines. For instance, the FCC approved a LEC's revenue sharing with a chat line provider in

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[49] *Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, ¶¶ 64-72 (2004) ("*CLEC Access Charge Reconsideration Order*").

[50] *Id.* at ¶ 70.

[51] *See* NPRM, ¶¶ 635-636.

AT&T Corp. v. Jefferson Telephone Co.[52] Also, the FCC found that it was not unlawful *per se* for a carrier to pay private payphone commissions to aggregators noting that such commission payments do not reduce the tariffed rate paid to the carrier by the customer.[53] The CLECs agree with Consolidated that revenue sharing does not somehow violate section 203(c)(2).[54] As the FCC has held, commission payments made to entities that are not customer's of a carrier's interstate service do not violate section 203(c)(2).[55] In most revenue sharing arrangements at issue in the access stimulation proceeding, the CLECs understand that the customer purchases an intrastate service from the LEC. Also, as PAETEC has noted, "every discount off of standard pricing offered by a communications provider to an end user is, in effect, a form of 'revenue sharing' to that end user for stimulating traffic growth."[56] If discounts on local service packages are unlawful rebates under section 203(c)(2), then every LEC offering tailored discounts is engaging in unlawful rebates. In short, the unlawful rebate argument is a red herring and adopting that position could have adverse consequences for many more arrangements than access stimulation.

Because CLECs are capped at the same rate level as the competing ILEC, access charge revenue sharing that merely incents a customer to move from one LEC to another within the same territory is harmless to IXCs and end users, and a legitimate means of promoting competition between LECs. Access charge revenue sharing alone is therefore not the root cause

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52 16 FCC Rcd. 16,130 (Aug. 31, 2001).

53 *AT&T's Private Payphone Commission Plan*, 7 FCC Rcd 7135 at ¶¶ 8, 10 (Nov. 4, 1992).

54 *See Ex Parte* Comments of Consolidated Communiations, WC Docket No. 07-135 and CC Docket No. 01-92, at 1 (filed Oct. 20, 2010).

55 *AT&T's Private Payphone Commission Plan*, 7 FCC Rcd 7135, at ¶ 8.

56 *Ex Parte* Comments of PAETEC Communications, WC Docket No. 07-135, at Attachment at 2 (filed June 12, 2008).

of the problem the Commission is seeking to address in this proceeding. That problem only arises under circumstances where revenue sharing becomes an incentive for portable, high-volume customers to locate in areas with extraordinarily high access charge rates based directly or indirectly on assumed higher costs and lower volumes. Any solution adopted by the Commission should target only the problem scenario and not revenue sharing in general.

The NPRM states (at ¶ 636) that although the conferencing "may appear as 'free' to a consumer of these services, the significant costs of these arbitrage arrangements are in fact borne by the entire system as long distance carriers that are required to pay these access charges must recover these funds from their customers." That is misleading, because it is only true where the access rates charged by the terminating LEC are exorbitant (or at least above average). Multiple end users dial into the bridge from all over. Each of them pays his chosen IXC the standard rate for the long distance call involved. Out of that revenue, the IXC pays the terminating LEC the applicable access charge. This is no different than the termination of "normal" long distance traffic. The problem (which is not specific to, or caused by, "access stimulation" arrangements) is that end user rates for long distance calling are, or are supposed to be, geographically averaged under section 254(g) of the Communications Act and Commission rules, whereas the access charges that LECs can charge in rural and high cost areas significantly exceed those in other areas. This means that, to the extent that rural LEC access charges are higher than average, the costs of *all* long distance calls to those areas are necessarily "borne by the entire system" -- regardless of whether those calls are to chat lines or "free" conference services, and regardless of whether there is any revenue sharing involved. The narrow problem the Commission is, or should be, trying to address exists only where revenue sharing arrangements incent chat lines or free conference calling services to locate in, or to relocate to, high access charge areas, thus increasing the overall access burden on IXCs and the end users who pay their geographically averaged rates.

On the other hand, when a free conference calling service is located, for example, in a service area where the access charges are capped at low RBOC rates, there is no burden on "the entire system" or any other problem the Commission needs to address. In this situation, when the end user callers pay their IXCs the same averaged long distance rates to reach the bridge, and the IXCs pay only the below-average RBOC rates to the CLEC, the IXCs actually realize a benefit: they pay nothing more than they would pay to complete an equal number of garden-variety long distance calls into the same area, and because the terminating access rates are actually *below* the national average, the IXCs get to retain the surplus and are therefore better off than if the calls weren't made at all. This is no less true even where the LEC is involved in a revenue sharing arrangement that results in a "net payment" to the conference call provider. The only thing the revenue sharing does in that situation is to influence which LEC the conference call provider will choose to connect to. If a CLEC is willing to share some of its RBOC-level access revenues in order to incent a free conference call provider to use the CLEC's local service rather than Verizon's, for example, there is absolutely no harm to "the system" or to anyone else – except perhaps to Verizon, who otherwise would have enjoyed the terminating access revenue for those calls. But that is simply competition, and should not be cause for Commission action to prevent it.

Nor is the fact that a CLEC is willing to share some of its RBOC-level access revenues with the conference call provider any indication that the CLEC's access charges are unreasonably high. If there is room to share a portion of those charges with the customer it is a function of the fact that today's tariffed access charges are above cost. Facilities-based CLECs agree that access rates should be transitioned to a cost-based rate, but there is no reason to single out the price cap rate charged by a CLEC for a faster transition to that cost-based rate than the same price cap rate charged by the ILEC.

In sum, the only real problem comes from stimulating calling into rural or other high access charge areas. Outside of those areas, there is absolutely nothing wrong with "free" conference calling or revenue sharing, and those practices shouldn't be targeted for enforcement.

E. Proposed Rule Changes

Facilities-based CLECs recommend the following changes to the proposed rules to address access stimulation:

- Eliminate the rule requiring that CLECs meeting the trigger file revised tariffs on 16 days notice (61.26(g)(1).
- Adopt a rule that any CLEC meeting the trigger who fails to file a revised tariff loses deemed lawful status as of the date it was required to refile the tariff but failed to do so.

V. VOIP

A. The FCC Should Not Adopt A VoIP-Specific Rate

Because there is no industry standard to identify VoIP-originated or terminated traffic, and the goal of the NPRM is to unify rates, the FCC should not adopt a VoIP-specific rate. As the FCC acknowledges, the industry has been disputing what rates (reciprocal compensation, toll, access, other) are applicable to IP-originated traffic for years.[57] These disputes rest, at least in part, on the inability of carries to distinguish IP-originated from TDM-originated traffic. Facilities-based CLECs are not aware of any industry standard, published or commonly accepted, to distinguish the two traffic types. Adopting a VoIP-specific rate would thus

[57] *See* NPRM, at ¶ 610.

exacerbate current disputes and arbitrage as providers would have an even greater incentive to claim their traffic is entitled to the VoIP-specific rate.

A VoIP-specific rate would also move the FCC further away from its ultimate goal of unifying a carrier's charges to terminate all types of traffic. As the FCC recognizes, one way to unify rates is to bring all intercarrier compensation under section 251(b)(5) with the FCC setting the methodology and the state setting the rate. Identifying yet another class of traffic that is subject to the FCC's interstate rate-setting jurisdiction under section 201 frustrates the goal of unifying rates under 251(b)(5). The FCC should decline to take such a step, even on an interim basis.

B. PSTN Charges (Reciprocal Compensation, Toll and Access) Should Apply to VoIP During the Transition to a Unified Rate

As explained herein, the FCC has the authority to adopt new rules that bring VoIP traffic within the access and reciprocal compensation regimes. Adopting new rules that apply existing TDM intercarrier compensation charges to VoIP traffic during the transition period would be consistent with the FCC's goal of ending arbitrage, minimizing carrier disputes, and bringing the industry closer to a unified rate for termination of all traffic types. This is a better solution than adopting a new rate category specifically for VoIP. It is also a better solution than classifying interconnected VoIP as a telecommunications service or clarifying the current ESP Exemption does not encompass interconnected VoIP traffic.[58] Although the FCC may intend any such

[58] As explained in Section III above, the ESP exemption only permits an information service provider to purchase access to the PSTN as an end user, and has no effect on the rights or obligations of telecommunications carriers that provide services to an ESP. Therefore, the Commission's classification of VoIP services, whether as telecommunications service or as information service, should have no effect whatsoever on the obligation of telecommunications carriers to pay for their use of switched access services purchased under tariffs, or of local interconnection services purchased under interconnection agreements, regardless of whether any of the calls involved were ultimately originated or terminated as VoIP.

classification or clarification adopted in this rulemaking to apply prospectively, it is not clear whether the courts would apply any such determination retroactively. Either means of imposing existing intercarrier compensation obligations on interconnected VoIP would perpetuate litigation over whether, and to what extent, intercarrier compensation charges are owed on interconnected VoIP traffic for prior periods. It could also have consequences far beyond the issue of intercarrier compensation, which are better addressed in the IP-enabled services rulemaking or the long-term reform phase of this proceeding.

1. A VoIP-Specific Rate Would Perpetuate Arbitrage

Any VoIP-specific rate would perpetuate arbitrage because carriers would have a powerful incentive to claim VoIP status to gain the favorable rate. There is no industry standard way to identify and distinguish VoIP-originated or terminated traffic from other traffic, so there would be no way to audit and confirm these claims. The FCC would be opening the barn door of arbitrage even wider, and shooing the horses out. Even if the FCC resolved the rate question, disputes about classification of VoIP traffic entitled to the rate would continue to plague the industry, courts, FCC, and state commissions.

On the other hand, if TDM and VoIP traffic are subject to the same compensation obligations, the industry could rely on existing rules and standards to determine jurisdiction of traffic and apply the correct rate. Subjecting VoIP and TDM traffic to the same rates that are eventually transitioned to a single, unitary rate regardless of jurisdiction will also bring the Commission closer to its goal of establishing a unified rate.

2. The FCC Should Modify Its Interstate Access Rules to Apply to VoIP

Section 251(g) singles out access traffic for special treatment and temporarily grandfathers the pre-1996 rules applicable to such traffic, including rules governing "receipt of compensation," such as the rules associated with the ESP Exemption.[59] But the rules preserved by section 251(g) remain in place only "until such … obligations are explicitly superseded by regulations prescribed by the Commission."[60] In the *Forbearance Order*, the Commission explained that section 251(g) "explicitly contemplates affirmative Commission action in the form of new regulation" as the sole means of replacing the pre-1996 Act access charge regime preserved under section 251(g) with another regulatory regime.[61]

The Commission can thus exercise its section 201 authority, preserved by section 251(g), to modify the orders that adopted the ESP Exemption and defined the scope of interstate access subject to rule 69.5. Under this authority, the Commission could, during the transition to a unitary rate,[62] eliminate the so-called asymmetric revenue arbitrage such that VoIP traffic is treated like PSTN traffic in both directions (IP-PSTN and PSTN-IP) for purposes of intercarrier compensation.

3. "Local" Interconnected VoIP Traffic Should Be Brought Within Section 251(b)(5) Immediately

Although the FCC could bring all VoIP traffic within section 251(b)(5) immediately, it

[59] NPRM, at ¶ 514.

[60] 47 U.S.C. § 251(g).

[61] *See Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, WC Docket No. 07-256, FCC 09-3, 24 FCC Rcd 1571, at ¶¶ 3, 8 (2009) ("*Forbearance Order*").

[62] *See* NPRM, at ¶ 617 ("In particular, [the Commission] note[s] that . . . this Notice proposes a gradual transition away from the current intercarrier compensation system to help ensure predictability for providers and investors.").

should not do so for the reasons discussed above. Carriers cannot distinguish IP from TDM traffic, so the approach that best meets the FCC's goals is to subject all IP and TDM toll and access traffic to the same rates and the same transition period.[63]

The Commission could and should bring VoIP traffic within the section 251(b)(5) framework without determining whether VoIP services are telecommunications services. Section 251(b)(5) imposes on *all LECs* the "duty to establish reciprocal compensation arrangements for the transport and termination of *telecommunications*."[64] The FCC has found that "interconnected VoIP providers are 'providers of interstate telecommunications.'"[65] It has also found that the reference to "telecommunications" in section 251(b)(5) is not confined to particular services (*e.g.*, "telephone exchange service,"[66] "telephone toll service,"[67] or "exchange access"[68]).[69] In the *2008 Order*, the Commission observed "that had Congress intended to preclude the Commission from bringing certain types of telecommunications traffic within the section 251(b)(5) framework, it could have easily done so by incorporating restrictive terms in section 251(b)(5)," however, Congress did not.[70] On appeal, the D.C. Circuit left intact the Commission's holdings

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[63] In the NPRM the Commission asks "[c]ould and should the Commission bring interconnected VoIP traffic within the section 251(b)(5) framework . . . ?" NPRM, at ¶ 615.

[64] 47 U.S.C. § 251(b)(5) (emphasis added).

[65] *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶ 35 (2006) ("*Contribution Methodology Order*").

[66] 47 U.S.C. § 153(47).

[67] 47 U.S.C. § 153(48).

[68] 47 U.S.C. § 153(16).

[69] *See Developing a Unified Intercarrier Compensation Regime*, CC Docket Nos. 01-92, 99-68, 96-98, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd 6475, 6480, ¶ 8 (Nov. 8, 2008) ("*2008 Order*"); NPRM, at ¶ 513.

[70] *2008 Order*, at ¶ 8.

concerning the broad scope of section 251(b)(5).[71] Thus, there is no need for the Commission to find that interconnected VoIP is a telecommunications service in this proceeding because it is clearly "telecommunications" that falls within section 251(b)(5).[72]

The Commission also has determined that section 251(b)(5) is not limited to traffic exchanged between LECs; rather, it applies to all traffic exchanged between a LEC and another carrier.[73] Accordingly, section 251(b)(5) includes "telecommunications" exchanged with a LEC, regardless of which party (a LEC, IXC, or VoIP) exchanges that traffic with the LEC. Consistent with these Commission findings, the Commission has broad authority to apply the duty to provide reciprocal compensation under section 251(b)(5) to all telecommunications traffic exchanged with LECs, including interconnected VoIP traffic.

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[71] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 429 (D.C. Cir. 2002).

[72] The Commission has not yet addressed the statutory classification of interconnected VoIP. *See* NPRM, at ¶ 618, n. 935. Rather, the Commission has only addressed the statutory classification of two forms of VoIP, neither of which are interconnected VoIP. For one, the Commission classified as an "information service" Pulver.com's free service that did not provide transmission and offers a number of computing capabilities. *See Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Order and Opinion, 19 FCC Rcd 3307 (2004). The Commission also has determined that certain "IP-in-the-middle" services are "telecommunications services. *See Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004); *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, 7297, ¶ 18 (2006).

[73] *2008 Order*, 24 FCC Rcd at 6480-81, ¶ 10; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15996-97, ¶¶ 1007-1008 (1996) (subsequent history omitted) ("*Local Competition First Report and Order*") ("All CMRS providers *offer telecommunications*. Accordingly, LECs are obligated, pursuant to section 251(b)(5) (*and the corresponding pricing standards of section 252(d)(2)*), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers.") (emphasis added).

4. State Commission Jurisdiction

The Commission need not classify VoIP as a telecommunications service in order for states to assert jurisdiction over intercarrier compensation for the exchange of VoIP traffic. As discussed above, the Commission can change its ESP exemption to make IP-PSTN traffic subject to section 251(g). Similarly, by making clear that "local" VoIP is subject to section 251(b)(5), the Commission will clarify states' jurisdiction to set rates for the exchange of "local" VoIP traffic and arbitrate the terms and conditions of such traffic exchange under section 252.

The intrastate access charge regime, like its interstate counterpart, was established by the 1982 AT&T consent decree, and, thus, appears to have been preserved by section 251(g).[74] Moreover, the rules preserved by section 251(g) remain in place only "until such … obligations are explicitly superseded by regulations prescribed by the Commission."[75] At the same time the FCC changes its ESP Exemption and access rules to apply access to VoIP traffic prospectively, it could invite the states to do the same with respect to intrastate access.

Moreover, even if the FCC cannot direct states to impose intrastate access charges on VoIP, the state commissions retain jurisdiction over the carriers with whom VoIP providers typically contract to deliver traffic to and receive traffic from the PSTN (where they do not have the requisite facilities to perform these functions themselves). These third party carriers (often CLECs) are subject to the jurisdiction of state commissions pursuant to section 252 with respect to the arbitration of section 251 obligations and under myriad provisions of state law. Because state commissions have jurisdiction over these third party carriers, and the LECs that originate or

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[74] *See United States v. AT&T Co.*, 552 F. Supp. 131, 227, 232-34 (D.D.C. 1982); *MTS and WATS Market Structure*, 93 F.C.C.2d 241, 246, ¶ 11 (1983).

[75] 47 U.S.C. § 251(g).

terminate telecommunications traffic (including VoIP), the Commission need not address (at least in the arbitrage phase of this proceeding) its jurisdiction over intrastate access.

C. If the FCC Declines to Unify TDM and VoIP Traffic, It Still Should Not Adopt $0.0007 as a Rate Because It Has No Basis in Cost.

As the NPRM acknowledges, while the FCC may determine the methodology for section 251(b)(5) traffic, there are legal obstacles to the FCC setting rates for such traffic.[76] Although the D.C. Circuit recently upheld the FCC's rate of $.0007 for ISP-bound traffic,[77] the FCC should not extend that rate to another class of traffic, such as interconnected VoIP. Creating another bucket of traffic subject to an arbitrary rate that fails the section 252(d) cost standard pushes the FCC further from its goal of a unified rate. The $0.0007 rate is an arbitrary figure that was never based on any cost analysis; in reality, it does not permit carriers to recover their costs unless, like Verizon and AT&T, they are extremely large with long distance, wireless and other affiliates that will receive a windfall from the reduced rates. This rate is simply too low – it is far below the costs of perhaps all carriers smaller than AT&T and Verizon. Moreover, it would have an especially harsh effect on CLECs and competitive tandem providers because competitive carriers are not guaranteed to recover any reductions in terminating revenues from universal service and increased SLC charges to consumers.

The vast majority of carriers oppose a rate of $0.0007 as the ultimate unified rate. For example, the National Exchange Carrier Association ("NECA"), which represents over 1,400 local telephone companies, has analyzed its data and found that the "proposed $0.0007 / minute

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[76] NPRM, at ¶ 512 (the FCC believes it has the requisite statutory authority to "bring all telecommunications traffic (intrastate, interstate, reciprocal compensation, and wireless) within the reciprocal compensation framework of section 251(b)(5), and *determine a methodology* for such traffic.") (emphasis added); ¶ 616 (acknowledging "questions about the extent to which the Commission can set particular rates rather than a methodology" under section 251(b)(5)).

[77] *See Core Communications, Inc. v. FCC*, No. 08-1365 (D.C. Cir. Jan. 12, 2010).

rate *doesn't even cover pool members' costs of billing*, let alone network costs," or the costs of investing in advanced networks.[78] Likewise, the National Telecommunications Cooperative Association ("NTCA"), which represents approximately 585 rural rate-of-return ("RoR") regulated telecommunications providers has urged "the Commission to reject the proposed unified $0.0007 terminating access rate because it will significantly harm rural consumers, unlawfully preempt the states, and *result in an unlawful taking of RoR carrier property*" in violation of the 5th Amendment of the U.S. Constitution.[79] In short, NTCA views the proposed $0.0007 rate as so low that it not only will preclude carriers from recovering their costs and earning a reasonable return on investments made to provide service, it will "result in a confiscatory taking."[80] The Independent Telephone and Telecommunications Alliance ("ITAA"), which represents midsized LECs, also opposes $0.0007 as a unified rate in rural areas where it argues it "would harm both end users and the carriers that serve them while *generating tremendous savings for larger players such as AT&T and Verizon*." ITAA underscores that the proposed rate "*would not cover the cost* of providing terminating access services in most rural areas."[81]

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[78] *Ex Parte* Presentation of NECA, CC Docket No. 01-92 and WC Dockets Nos 06-122 and 08-152, at 1, (filed Sept. 11, 2008) (emphasis added). ("Mandatory below-cost rates are likely to result in network abuse, new forms of uneconomic arbitrage, and unnecessary legal challenges.")

[79] *Ex Parte* Presentation of NTCA, CC Docket No. 01-92 and WC Docket No. 04-36, at 1, 4-5, n. 10 and 17 (filed Sept. 18, 2008) ("NTCA Sept. 18 *Ex Parte*"); U.S. Const. Amend. V. *See, e.g.*; *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (It is clear that "the Constitution protects utilities from being limited to charge for their property serving the public which is so 'unjust' as to be confiscatory.").

[80] NTCA Sept. 18 *Ex Parte*, at 1-2, 4-5; *see–Ex Parte* Interim Universal Service & Intercarrier Compensation Reform Proposal of NTCA, 19-20 (filed July 11, 2008).

[81] ITAA members include CenturyTel, Consolidated, Embarq, FairPoint, Iowa Telecom, TDS Telecom, Frontier, Windstream and others. *Ex Parte* Presentation of ITAA CC Docket No. 01-92, at 1 (filed Sept. 19, 2008) (emphasis added); *Ex Parte* Presentation of ITAA, WC Docket No. 04-36 *et al.*, at 4 (filed Aug. 21, 2008).

In addition to NECA, NTCA and ITAA, CenturyTel, Windstream, Embarq, Chicasaw Telephone Company, Eastex Telephone Cooperative, Great Plains, XO Communications, NuVox, PAETEC, and a host of others have presented convincing empirical and other evidence that demonstrates the proposed $0.0007 terminating rate would not cover carriers' costs, and in many cases would not even cover the carriers' cost of billing, let alone network costs or the costs of building and maintaining advanced innovative networks and services.[82]

For example, NuVox's Comments and the study of independent consultant QSI Consulting, Inc.'s ("QSI Study") reveals that the average of state commission approved cost-based traffic termination rates "across approximately 40 jurisdictions equals $0.0029 per minute," or more than four times $0.0007.[83] Further, the QSI Study found that the "weighted average of those rates (using relative access lines as the weighting mechanism), equals $0.0027 per minute," again nearly 4 times $0.0007.[84]

QSI Studies submitted on behalf of PAETEC and XO Communications Services, Inc. establish that each CLEC's costs for terminating traffic exceed $0.0007. With respect to PAETEC, QSI's Study shows that even with its "notable, traffic termination economies beyond those enjoyed by a majority of CLECs" a "rate equal to $0.0007 would fall far short of properly compensating PAETEC for the capital it has deployed and the expenses it incurs in transporting

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[82] *See, e.g., Ex Parte* Comments of CenturyTel, CC Docket No. 01-92, at 4 (filed Sept. 19, 2008) ("Using an unrealistic national rate, such as $0.0007, is below costs, fails to protect rural consumers, and displaces costs on other consumers."); *Ex Parte* Comments of Windstream, CC Docket No. 01-92, at 2 (filed Sept. 24, 2008) (maintaining the $0.0007 rate constitutes a windfall for payers of access charges); Reply Comments of Embarq, CC Docket No. 01-92, at 6 (filed Sept. 6, 2008) ("Embarq Reply Comments"); *Ex Parte* Comments of NECA, WC Docket No. 08-152, (filed Sept. 11, 2008); NTCA Sept. 18 *Ex Parte*, at 1-2, 4-5.

[83] *Ex Parte* Comments of NuVox, CC Docket No. 01-92 and WC Docket No. 04-36, at 1-2 (filed Oct. 2, 2008) ("NuVox *Ex Parte*") and attached Declaration of Michael Starkey at 2.

[84] NuVox *Ex Parte*, at Declaration of Michael Starkey at 5.

and switching voice-related services."[85] QSI's cost study for XO Communications Services, Inc. also "shows that $0.0007 is very far below XO's actual costs of termination.[86]

Embarq similarly maintains that a terminating access rate of $0.0007 is far below any of Embarq's access rates and the rate for Tier 2 carriers in the Missoula Plan, and it "would be woefully insufficient to compensate Embarq for building and maintaining backbone networks that provide voice and broadband services to rural America."[87] Great Plains Communications, Inc. ("Great Plains") states that the proposed $0.0007 rate is less than its billing costs and its TELRIC costs are *30 times higher*.[88] Great Plains together with Chickasaw Telephone Company, Eastex Telephone Cooperative, Consolidated Companies of Lincoln, Nebraska, and the Texas Statewide Telephone Cooperatives, Inc. introduced evidence that in their states rural carriers' reciprocal compensation rates range between $0.020 and $0.025 per minute, several times higher than the proposed default rate. They underscored that the $0.0007 rate does not recover even their costs of billing.[89]

The cost data filed by numerous companies individually, together with the QSI survey of state-set TELRIC rates showing that the average of all state rates for functions comparable to transport and termination was approximately $0.003, provide persuasive empirical evidence

[85] *Ex Parte* Comments of PAETEC, CC Docket No. 01-92 and WC Docket No. 04-36, at attached Declaration of Michael Starkey at 2 and 7 (filed Oct. 17, 2008) ("*PAETEC Ex Parte*").

[86] *Ex Parte* Comments of XO Communications Services, Inc., CC Docket No. 01-92, at 1 (filed Oct. 6, 2008).

[87] Embarq Reply Comments, at 6.

[88] *Ex Parte* Comments of Great Plains Communications, CC Docket No. 99-68, at 6, 8 (filed Sept. 17, 2008) (emphasis added).

[89] *See Ex Parte* Comments of Great Plains Communications, Chickasaw Telephone Company, Eastex Telephone Cooperative, Consolidated Companies of Lincoln, Nebraska, and the Texas Statewide Telephone Cooperatives, Inc., CC Docket No. 96-45 et al., at 3-4 (filed Oct. 8, 2008) ("*Great Plains Group Comments*").

demonstrating that the $0.0007 rate is substantially, by at least an order of magnitude, below the rates set by states that comply with the applicable section 252(d) standard for prices for transport and termination.[90] Accordingly, the Commission should reject any proposal to extend a rate of $.0007/min to VoIP traffic, or indeed to any other class of traffic.

VI. CONCLUSION

Facilities-based CLECs urge the FCC to implement the changes to the rules recommended herein to reduce arbitrage without creating competitive disadvantages or moving the industry further away from a unified rate. The CLECs look forward to working cooperatively with the Commission and industry to overhaul current intercarrier compensation policies.

Respectfully submitted,

/s/

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Dated: April 1, 2011

[90] Comments of Cavalier Telephone, LLC, McLeod USA Telecommunications Services, Inc., Norlight Telecommunications, Inc., Pac-West Telecomm, Inc., and RCN Corporation, CC Docket No. 01-92, at 60 and Attachment 1 (filed Oct. 25, 2006).

Attachment A

Declaration of Tami J. Spocogee

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	))	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	))	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

DECLARATION OF TAMI J. SPOCOGEE

I, Tami J. Spocogee, on oath, state and depose as follows:

I. INTRODUCTION

1. My name is Tami J. Spocogee. I currently serve as Director of Carrier Access & Financial Support of PAETEC Holding Corp. PAETEC has four primary operating subsidiaries – PAETEC Communications, L.L.C., US LEC entities, McLeodUSA Telecommunications Services, L.L.C. and Cavalier Telephone entities, that all do business under the PAETEC name (hereinafter jointly referred to as “PAETEC”). I am submitting this Declaration to provide a factual basis for the comments and recommendations PAETEC submits on several issues related to the phantom traffic proposal set forth in the Notice of Proposed Rulemaking by the Federal Communications Commission (“FCC”) adopted February 8, 2011, in the above-referenced dockets.

II. BACKGROUND IN CABS BILLING

2. I have been involved in the telecommunications industry since 1980, when I began working for Southwestern Bell Telephone Company ("SWBT"). I held a variety of positions with SWBT starting in the commercial business office. In 1985 I joined the Inter-exchange Carrier Service Organization where my primary responsibilities concentrated on Access and Interconnect billing. My specific titles and responsibilities were Service Representative in the Service Center and Manager - SWBT Headquarters handling billing and dispute processes. I also was a member of a BellCore (now Telcordia) task force established to improve integrity between the billing, ordering and network systems for SWBT. The last position I held at SWBT was Manager in the Service Center handling billing issues for most inter-exchange carriers and competitive local exchange carriers ("CLECs"). In August 1994 I joined WilTel, subsequently acquired by WorldCom and changed to MCI, as a Manager in the Network Cost Organization. I subsequently moved to Senior Manager over the Network Cost organization, handling payments, audits and disputes of network and CLEC services. During this time (6 years), I was also a participant, and for two years a Co-Leader, of the Billing Committee in the Order and Billing Forum ("OBF").

3. I joined McLeodUSA Incorporated in September 2000 as a Senior Manager over the network cost organization. My organization was responsible for payments, audits and disputes of network services purchased from other telecommunications service providers. In December of 2004, I also started managing the group responsible for Carrier Access Billing System access services billings and the related billing disputes. I later became Director of Network Cost and Access Billing for McLeodUSA. After PAETEC acquired McLeodUSA in February 2008, I became Director of Carrier Access and Financial Support for the entire PAETEC organization.

III. PHANTOM TRAFFIC PROPOSAL

4. The proposed rule mandating placement and changes of the Calling Party Number ("CPN") and Charge Number ("CN") may assist in addressing the phantom traffic problem if a call is local or IntraLATA. However, this limited proposal would not remedy the phantom traffic problem for InterLATA traffic, which constitutes the bulk of the phantom traffic for PAETEC today. PAETEC estimates that over 80% of its unbillable "phantom traffic" calls are InterLATA traffic. Moreover, there are sound reasons why the mandated use of the CPN and CN may unreasonably inhibit competitive service offerings.

5. The following example depicted on the attached diagram (Exhibit A) highlights why the proposal to mandate passing of the CPN and CN would be of limited value in addressing the bulk of the Phantom Traffic problem. A wireline TDM originated call from the state of Ohio terminated in the state of Florida is an Interstate /InterLATA toll call. Under today's intercarrier compensation regime, the terminating local exchange carrier is entitled to bill switched access to the interexchange carrier that provided the toll service call terminating to the LEC's end user. Ensuring the passing of the CPN or the CN on the call record will not enable the terminating LEC to identify the interexchange carrier ("IXC") responsible for payment of the terminating access charges, nor will it necessarily properly identify the call as a toll call. The missing element that must be retained in the call record throughout all handoffs of the toll call is the Carrier Identification Code ("CIC"). The critical field that is required on an InterLATA call is the CIC code associated with the IXC carrier terminating the call to the terminating local company.

6. If a call originates as a TDM Feature Group call, the originating LEC assigns a CIC code to the call that determines the original IXC network carrying the call. In order for an IXC to

complete the call, there could be several different methods of routing that can occur before the call reaches the final terminating LEC:

a. The original IXC (IXC #A) that received the call has the long distance network to transport the call all the way through to the terminating LEC serving the end user called party. As a 1+ dialed TDM toll call, this call should terminate via a Feature Group D or interLATA trunk of the terminating LEC. In this case, the CIC associated with IXC#A should be passed through to the terminating LEC, which can then bill IXC #A for terminating access to the end user.

b. The IXC #A does not have a long distance network connection all the way through to the terminating LEC serving the end user called party. Thus, IXC #A hands the call off to IXC #B that has a long distance network to terminate to the LEC serving the end user called party. If IXC #B carries the call through to the final LEC, then IXC #B should insert its own CIC on the call record and transport the call through to the Feature Group D or interLATA trunk of the terminating LEC serving the end user called party.

c. Neither IXC#A nor IXC #B has a long distance network all the way through to the terminating LEC serving the end user called party. Thus, IXC #A hands the call off to IXC #B which hands it off to IXC #C (etc.) that has a long distance network to the terminating LEC serving the end user called party. If such daisy chaining occurs, the CIC of the last IXC should be inserted in the call record and supplied to the terminating LEC in order to bill the call to the IXC responsible for paying terminating access.

7. For TDM calls, the LEC should bill the last IXC that hands them the call for termination because the typical arrangement is that the IXC that delivers the call to the terminating LEC directly bills the preceding intermediate IXC that handed it traffic. In this example, IXC #B

would bill IXC #A, IXC #C would bill IXC #B, and the LEC would bill IXC #C for the final termination.[1]

8. Absent a requirement to maintain the CIC in the call record, the call type of a TDM call handed off to an IXC may be changed from a TDM interstate/interLATA toll call to a local call, and the terminating LEC will have no means by which it can easily detect the change in the call type, whether intentional or inadvertent, or identify the offending intermediate carrier responsible for the change. Although imposing a requirement to retain the originating CPN, CN and/or Calling Party Local Routing Number may help the terminating LEC to determine the jurisdiction and originating provider of the call, those pieces of information will not enable the terminating LEC to identify the party responsible for payment of the terminating access charges. While the terminating LEC can potentially trace the call back to the originating LEC serving the calling party using the CPN or because of porting the calling party JIP (Jurisdiction Information Parameter) which converts to the Calling Party LRN (Local Routing Number), the terminating LEC still has no way to determine the IXC responsible for paying the terminating access, nor can it identify where in the call hand off the call type was changed.

9. PAETEC uses the AMA format of call records to determine the criteria to bill access for its Lucent 5ESS and Nortel DMS switches. Most existing Ordering and Billing Forum ("OBF") guidelines have been built around use of the AMA format for message processing and billing. Even for call records originated using a different format such as those coming from its GenBan soft switch, PAETEC converts those call records to the AMA format for billing purposes. (Although the AMA is used to determine the billing criteria for CABS billing,

[1] For non-TDM traffic, the terminating LEC should bill the last carrier that delivers the traffic to the tandem (e.g., Least Cost Router, ESP, etc.), and that service provider should be entitled to bill the carrier that handed them the traffic, etc.

once the billing data is determined from AMA the final format of the records sent to CABS for billing are a summary level format called EMI.) How AMA call records are populated in various call examples is set forth below.

10. When a call originates as a Local/Intralata call that is non-IXC routed, a "Call Code" is assigned to the AMA record for billing purposes:

– Local calls – Call Code 001, 005 or 067

–IntraLATA – Call Code 006

11. In combination with the Call Code, there is a separate "Structure Code" that defines the fields that are to be populated for each call. The most common is Structure Code 0001, which is an answered Local & Intra-LATA call.

12. When a call originates as an IXC routed call, the Call Code is set at either a 110 for a 1+ IXC routed call, or Call Code 141 – for an originating 8XX call. These calls typically have a Structure Code of 0625 which is for InterLATA IXC calls.

13. The following table shows the AMA format Structure Codes contained in call records used for Local/IntraLATA versus an InterLATA call routed through an IXC. As the table shows, there is no field to populate the CIC for Local/IntraLATA calls.

AMA Information Fields	Structure Codes	
	Local & Intra-LATA	Inter-LATA
	1	625
Record Descriptor Word	X	X
Hexadecimal Identifier	X	X
Structure Code	X	X
Call Type Codes	X	X
Sensor Type	X	X
Sensor Identification	X	X
Recording Office Type	X	X
Recording Office Identification	X	X
Date	X	X
Timing Indicator	X	X
Study Indicator	X	X
Answer Indicator	X	X
Service Observed, Traffic Stamped	X	X
Operator Action	X	X
Service Feature	X	X
Originating NPA	X	X
Originating Number	X	X
Overseas Indicator	X	X
Terminating NPA	X	X
Terminating Number	X	X
Connect Time	X	X
Elapsed Time	X	X
IC/INC Prefix (CIC)		X
Carrier Connect Date		X
Carrier Connect Time		X
Carrier Elapsed Time		X
IC/INC Call Event Status		X
Trunk Group Number		X
Routing Indicator		X
Dialing Indicator		X
ANI Indicator		X

14. Calls to local customers served by CLECs are typically transmitted through a local tandem, which is most often owned and operated by the ILEC. Once a call is transmitted through one of the local tandems, the tandem owner is required to transit the call to the correct terminating LEC. The AMA records would also be changed to a terminating call type instead of originating as shown above. The tandem owner determines how the call should be sent through an Interconnect Trunk group they have with the terminating LEC. If the tandem owner receives the call through Local Interconnection Trunk groups (Call Code 720) (dedicated to Local/IntraLATA) the call is transmitted to the terminating LEC via Local Interconnection Trunk Groups (dedicated to Local/IntraLATA). This is true even if the call originated as a 1+ dialed TDM toll call.

15. However, if a call is sent to the tandem provider through IXC trunk groups with a CIC assigned (Call Code 119), the tandem provider will send the calls through the IXC Interconnection Trunks to the terminating LEC. In most cases the CIC code associated with the call is dropped at the tandem. However, if a call is terminated across IXC groups, the tandem provider is required to send EMI (summary level meet-point) records along with the CIC to the terminating LEC in order for IXC billing to occur.

16. Normally, local / intraLATA calls are not sent as EMI (summary level meet-point) records as the LEC/CLEC can usually bill from their own recordings however, there are some smaller CLECs which do utilize the EMI records for local /intraLATA calls. As a result of the process established the tandem provider will provide EMI records for billing according to the requirements of the ILEC or CLEC subtending the tandem.

17. The proposal to require service providers to transmit the Calling Party Number and the Calling Party “Charge Number” could be problematic for service providers when serving certain customer and product types if that requirement is interpreted to mean that a LEC

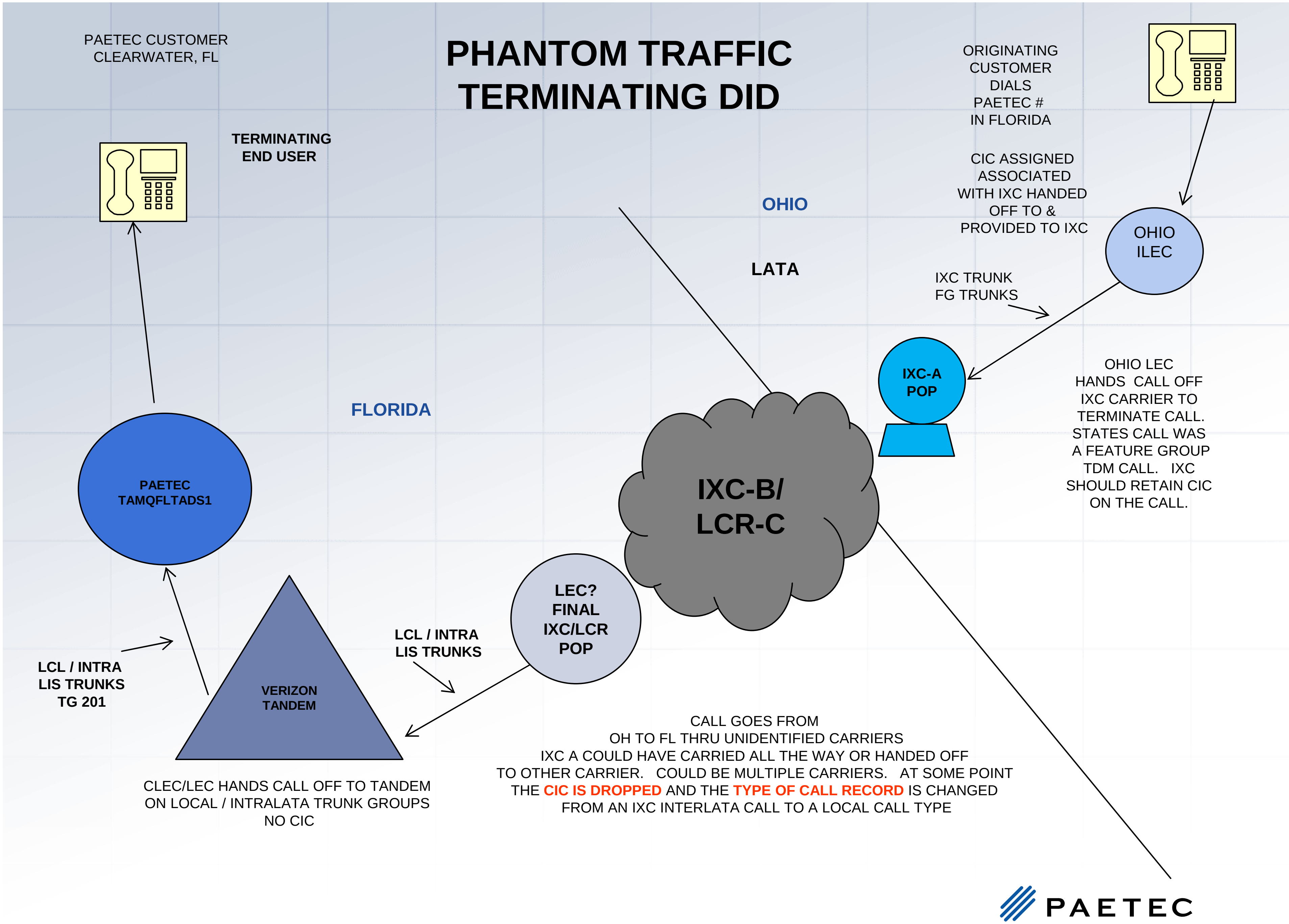
cannot populate the Charge Number with a number representing the trunk group where the customer interconnects with the LEC instead of the end user customer's phone number. Inserting the Charge Number assists the LEC in identifying the customer usage for billing purposes, product identification, troubleshooting, network identification, etc. and does not require all end user numbers to be loaded into the LEC's databases, etc. Restricting that practice would impact the network and require multiple changes to be made on existing customers and new processes developed for existing and new customers. Possible changes in billing systems may be required in addition to the network process changes. The "Calling Party Number" would not be changed and would still be carried through the signaling provided. Because the Charge Number is associated with PAETEC and the Calling Party Number and/or Calling Party JIP generally allows the terminating LEC to identify the originating location of the call for proper call rating, the traffic can be billed the proper rate.

IV. DECLARATION

18. I declare that I created this Declaration with the assistance of persons under my direct supervision and that, to the best of my knowledge, the facts represented herein are true and accurate.

Tami J. Spocogee

Exhibit A


PHANTOM TRAFFIC
TERMINATING DID
PAETEC CUSTOMER
CLEARWATER, FL
TERMINATING
END USER
ORIGINATING
CUSTOMER
DIALS
PAETEC #
IN FLORIDA
CIC ASSIGNED
ASSOCIATED
WITH IXC HANDED
OFF TO &
PROVIDED TO IXC
OHIO
LATA
FLORIDA
OHIO
ILEC
IXC TRUNK
FG TRUNKS
IXC-A
POP
OHIO LEC
HANDS CALL OFF
IXC CARRIER TO
TERMINATE CALL.
STATES CALL WAS
A FEATURE GROUP
TDM CALL. IXC
SHOULD RETAIN CIC
ON THE CALL.
IXC-B/
LCR-C
PAETEC
TAMQFLTADS1
LEC?
FINAL
IXC/LCR
POP
LCL / INTRA
LIS TRUNKS
LCL / INTRA
LIS TRUNKS
TG 201
VERIZON
TANDEM
CLEC/LEC HANDS CALL OFF TO TANDEM
ON LOCAL / INTRALATA TRUNK GROUPS
NO CIC
CALL GOES FROM
OH TO FL THRU UNIDENTIFIED CARRIERS
IXC A COULD HAVE CARRIED ALL THE WAY OR HANDED OFF
TO OTHER CARRIER. COULD BE MULTIPLE CARRIERS. AT SOME POINT
THE CIC IS DROPPED AND THE TYPE OF CALL RECORD IS CHANGED
FROM AN IXC INTERLATA CALL TO A LOCAL CALL TYPE
PAETEC